(10)

No. 97-1909

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

MURPHY BROTHERS, INC.,
Petitioner,
v.
MICHETTI PIPE STRINGING, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 75 national and international unions with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

SUMMARY OF ARGUMENT

The question in this case is whether, by a technical amendment to 28 U.S.C. § 1446(b), Congress abrogated the requirement that an individual named as a defendant in a state court lawsuit be served with a summons or other jurisdiction-invoking process before having to take action to remove the suit to federal court. The answer is "no."

As we show in Part I of our Argument, in both state and federal courts—and from the earliest years of the nation—putative defendants have been required to take action in a court *only* when informed in a formal, prescribed manner, directed in many instances at a predesignated representative or agent for purposes of service, that another party is invoking the court's jurisdiction and seeking to compel that individual to participate in court proceedings. While the precise form of the service of summons or other jurisdiction-invoking process varies from state to state, from state to federal courts, and within jurisdictions (according, for example, to the type of action at hand), the bedrock requirement that *some* formality, served in a specified manner upon specified individuals,

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

trigger the obligation to respond in some manner is a consistent *sine qua non* of judicial authority.

And, as we show in Part II of our Argument, this long-standing, bedrock requirement is critical to the statutory analysis this Court must perform. In light of the long-standing and fundamental role of service of summons, its abrogation may not be lightly implied, but must be compelled by the language and history of the statute. Here, neither the language nor the history could possibly compel this result. Read in context, the language can and must be given a meaning that respects, rather than abrogates, this basic procedural norm. And, the legislative history demonstrates that Congress had no interest in abrogating state court rules regarding service of summons. Instead, the 1949 Congress sought "uniformity" in the removal process only *after* service of summons or other jurisdiction-invoking process had occurred, and amended the removal statute to solve a problem—*viz.*, that the defendant served with a summons was not provided a copy of the complaint, and therefore had insufficient information on which to base the decision to remove—that arose in some jurisdictions *after* such service of summons.

ARGUMENT

In numerous instances lawsuits that could be filed in federal court can be, and are, filed in state court. The question in this case arises out of Congress' efforts to provide—through a "removal procedure" that can be initiated by the defendant in a state court lawsuit—for the adjudication in federal court of cases that come within the constitutional jurisdiction of the federal courts.

Congress' efforts, of course, have had to take account of the point that the rules for bringing a putative defendant into a lawsuit vary with jurisdiction, both from state to state and often, between any particular state court and the adjacent federal court (whose case initiation and party inclusion requisites are stated not in state law but in Federal Rules of Civil Procedure 3 & 4).

Because of that variance, in describing the time period for removing a case from state court to federal court, Congress has had a more difficult task than in describing the uniform rules that govern the time periods within which an individual named in a federal court complaint as a defendant must act to protect his rights.

In this regard the current removal provision reads as follows:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter. [28 U.S.C. § 1446(b)]

Looking at this provision in complete isolation, the Court of Appeals concluded that the provision can *only* be read as requiring that an individual named as a defendant in a removable state court civil action who (a) has *not* been served with a formal summons or other means of calling that individual within the jurisdiction of any court, but (b) is provided informally with a bare copy of a complaint, must file her notice of removal within 30 days of receiving the complaint.

The Court of Appeals so held although the consistent governing rule in the removal statutes before the pertinent 1949 amendment to 28 U.S.C. § 1446 was, to the contrary, premised on the basic principle of American jurisprudence that an individual becomes an active party to a lawsuit, required to take action to avoid legal jeopardy and protect her interests so as to avoid judgment against her, *only* upon formal service of a summons or similar

jurisdiction-invoking process. And the Court of Appeals so held although the 1949 change was drafted and enacted, as far as appears, *not* to alter that continuous rule of American law for removal cases, but to solve a modest, technical problem that arises in removal cases particularly—*viz.*, assuring that an individual who has been apprised through formal process that the plaintiff intends to pursue a judgment against that individual, and that he is therefore in legal jeopardy, need not take action to remove the case while still in the dark concerning information—the other parties and the precise nature of the causes of action—necessary to make a proper decision regarding removability.

It is our submission that § 1446, read in the context of the Judicial Code generally and of the Federal Rules of Civil Procedure—as well as in light of the prior removal procedure statutes and rules and the avowed purposes of the 1949 changes to those statutes and rules—could not have been intended to demand that an individual act protectively to assure his or her right to proceed in federal court on the possibility that she will later be served with summons and thus exposed to possible adverse judgment. *See* pp. 4-13, *infra* As the first step in making that submission, we survey briefly the background American jurisprudence on the critical role of service of summons. We demonstrate next that the statutory language does *not* mandate the abrogation of that critical role in removal cases but rather, together with the legislative history, confirms that Congress intended only a minor, technical amendment to resolve a problem that arises *after* service of process. *See* pp. 13-25, *infra.*

I. THE ROLE OF SERVICE OF SUMMONS IN AMERICAN CIVIL PROCEDURE.

A. Two related propositions regarding the function and effect of service of summons serve as the bedrock of our civil procedure system:

First, for both non-resident and resident defendants, there must be some formal process sufficient to bring the person before the court. Otherwise, the court lacks compulsory authority over the individual and there is no basis for requiring the putative defendant to take action to protect his procedural and substantive rights.

Second, a summons also serves a second and related role relating to the *in personam* jurisdiction of the court, namely, providing individuals named in the complaint as defendants with notice by prescribed means that a legal proceeding has been brought against the individual named as defendant and that the defendant must take certain responsive actions to protect and preserve his legal rights or face summary judicial action.

1. The notion that there must be some definite, formal means of calling an individual before a court through compulsory process derives, in the first place, from the venerable "proposition . . . embodied in the phrase *coram non judice*, 'before a person not a judge'—meaning, in effect, that the proceeding in question was not a *judicial* proceeding because lawful judicial authority was not present . . ." *Burnham v. Superior Court of California*, 495 U.S. 604, 609 (1990) (plurality opinion) (Scalia, J.). To paraphrase the Court in *Pennoyer v. Neff*, 95 U.S. 714, 732 (1877), "if the court has no jurisdiction over the person of the defendant . . . [it has] no authority to pass upon his personal rights and obligations . . .[and] the whole proceeding, without service upon him or his appearance, is coram non judice and void . . ." *See also e.g.*, 4 C. Wright & A. Miller, Federal Practice and Procedure § 1063, p. 224 (2d ed. 1987) ("The concepts of subject matter jurisdiction and venue should be distinguished from the principle that the court must have jurisdiction over defendant's person, his property, or the res that is the subject of the suit.")

The summons is the modern means of asserting judicial authority with regard to a person who has not himself or herself invoked that authority by filing an action; a sub-

stitute, in effect, for asserting directly the "physical power" of the court. *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).[2] Under the common law, an individual was compelled to defend an action by the writ of *capias ad respondendum*, which commanded the sheriff to take physical control over the defendant and keep custody of him so that he may answer the plaintiff in the action. Black's Law Dictionary 208 (5th ed. 1990); *see also* 1 J. Moore Federal Practice ¶ 0.6 [2-2] (2d ed. 1995); 3 W. Holdsworth, *A History of English Law* 626 (5th ed. 1942); *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484 (1813). The summons replaced that writ. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). It, too, was traditionally directed to the sheriff or other proper officer, but, rather than requiring the physical seizure of the putative defendant, required the sheriff to notify the person named that an action has been commenced against him in the court from which the summons issued, and that the person had to appear on the day named to answer the complaint against him. Black's Law Dictionary 1436 (5th ed. 1990).

While the person served was no longer arrested, the summons served to compel the defendant to appear in court. Consequently, "[b]efore a . . . court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied. '[S]ervice of summons is the procedure by which a court . . . asserts jurisdiction over the person of the party

[2] Justice Holmes noted in *McDonald* that "[t]he foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person. Michigan Trust Co. v. Ferry, 228 U.S. 346, 353 [(1913)] . . . ; Pennsylvania F. Ins. Co. v. Gold Issue Min. & Mill. Co [243 U.S. 93 (1917)]. No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind." 243 U.S. at 91.

served.' " *Omni Capital Int'l v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987) (quoting *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-445 (1946)).

The function of the summons as an expression of the authority of the court in compelling the defendant to respond or lose procedural or substantive rights is one that depends on manner as well as content, and, as such, is distinct from, and in addition to, a requirement that the defendant be notified of the action.

This Court has expressly so recognized. In determining the prerequisites to a court's exercise of *in personam* jurisdiction, the Court explained that "before a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons," and the procedural requirement of actual service of process must be satisfied. *Omni Capital Int'l, supra*, 484 U.S. at 104.[3]

As Federal Rule of Civil Procedure 4 indicates, a formal, properly served summons continues to be required in modern jurisprudence as the *sine qua non* before an individual is considered a party to litigation and required to participate or forego procedural or substantive rights. Rule 4 specifies that "[a] summons, or copy . . ., shall be issued for each defendant to be served," and that the "*summons shall be served* together with a copy of the complaint." Rule 4 (b), 4(c)(1) (emphasis added). Service of the summons is required except where the defendant waives the service; the formal requirements for such service are set forth in

[3] In *R. H. Hassler, Inc. v. Shaw*, 271 U.S. 195, 198-199 (1925), for example, an out-of-state defendant received a copy of a summons and complaint and thus was notified of the state court proceeding, but there was *no valid service of process*. The *Hassler* Court concluded that the state court's judgment was void for lack of service of process.

paragraphs (e)-(i) of the Rule. State courts have similar rules requiring service of the summons.[4]

2. The second function of service of summons in a civil suit developed later, and reflects the requirement of the due process clause of the Fourteenth Amendment that a defendant have proper notice of the instigation of an action against him so that he may appear to protect his rights. Such notice must be

> reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. [*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950) (citations omitted).]

This fundamental, mandatory notice that the individual must respond—and of the consequences of not responding—is now generally satisfied through service of summons which, as this Court has explained, is "a formal delivery of documents that is legally sufficient to charge the defend-

[4] *See, e.g.*, Ala. Rule Civ. Proc. 4 (1998); Alaska Rule Civ. Proc. 4 (1998); Ariz. Rule Civ. Proc. 4 (1998); Ark. Rule Civ. Proc. 4 (1998); Cal. Civ. Proc. Code §§ 410.50, 412.20, 415.10 (Deering 1998); Colo. Rule Civ. Proc. 3 (1998); Del. Super. Ct. Civ. Rule 4 (1998); D.C. Super. Ct. Civ. Rule 4 (1998); Fla. Rule Civ. Proc. 1.070 & Form 1.902 (1998); Haw. Rule Civ. Proc. 4 (1998); Idaho Rule Civ. Proc. 4 (198); Ky. Rule Civ. Proc. 4 (1998); Me. Rule Civ. Proc. 4 (1998); Md. Ct. Rule 2-121 (1997); Mass. Rule Civ. Proc. 4 (1998); Mich. Ct. Rule 2.108 (1998); Miss. Rule Civ. Proc. 4 (1998); Mont. Code Ann., ch. 20, Rule 4D (1997); Nev. Rule Civ. Proc. 4 (1998); N.M. Dist. Ct. Rule Civ. Proc. 1-0004 (1997); N.C. Gen. Stat. § 1A-1, Rule 4 (1997); N.D. Rule Civ. Proc. 4 (1997); Ohio Rule Civ. Proc. 4 (1998); Or. Rule Civ. Proc. 7 (1996); R.I. Rule Civ. Proc. 4 (1997); S.C. Rule Civ. Proc. 3, 4 (1998); Tenn. Civ. Proc. Rule 4.01 (1998); Utah Rule Civ. Proc. 3, 4 (1998); Vt. Rule Civ. Proc. 4 (1997); W. Va. Rule Civ. Proc. 4 (1997); Wis. Stat. § 801.02 (1997); Wyo. Rule Civ. Proc. 4 (1997).

ant with notice of a pending action." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988) (citing, *inter alia*, Black's Law Dictionary 1227 (5th ed. 1979), and 4 C Wright & A. Miller, Federal Practice and Procedure § 1063, p. 225 (2d ed. 1987)).

Again, Rule 4 illustrates the modern-day role of a summons in notifying the defendant when and where he must respond, and the consequences of not responding. Thus, in federal court, the summons "shall state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint." [5] State court requirements for a summons require similar information. *See* n.4, p. 8, *supra*.

Although due process does not specify that notice must be in the form of a summons (cf. *Mullane*), it is plain that the proper notice requirement *is not* satisfied by an initial pleading setting forth a claim for relief alone. Such a pleading, standing by itself, does not inform a party of whether the plaintiff will take the steps to obtain the jurisdiction of the court over the individual (which as noted above, requires service of the summons), and thus does not provide sufficient information to the putative defendants regarding "the pendency of the action," their "opportunity to present their objections" or the time within which "those interested [must] make their appearance." Without such notice, an individual named in the complaint as a

[5] *See also* the form Summons set forth in the Appendix of Forms to the Federal Rules of Civil Procedure which notifies the defendant that he is:

> hereby summoned and required to serve upon ————, plaintiff's attorney, whose address is ————, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Form 1, Summons, Appendix of Forms (footnote omitted).

defendant does not have legally adequate information to impress on her the necessity to consult counsel and to seek to assert her position in the manner most calculated to result in a court judgment favorable to her—including, where the substantive prerequisites are met, removing the case from state to federal court as specified in the federal statutes and rules.[6]

B. At all times before 1949, service of a summons or other jurisdiction-invoking process was a prerequisite to the accrual of the limitations period for removing a case from state court to federal court. Commentator Henry Campbell Black summarized this early history in an 1898 treatise:

> The removal act of 1887 provides that when the removal of a cause is sought on the ground of local prejudice, the removal may be made "at any time before the trial thereof." But in all other cases the petition for removal must be made and filed "at the time, or any time before, the defendant is required by the law of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff. . . ." Under the original judiciary act of 1789, the petition was required to be filed "at the time of entering his appearance in the state court." Under the local prejudice act of 1867, the application was to be made "before the trial or final hearing of the suit." Under the

[6] It is worthy of note that under the Eleventh Circuit's construction of 28 U.S.C. § 1446, receipt of the complaint informally by the nonlawyer party named in the complaint would suffice to trigger the removal limitations period; indeed, where no service of summons has occurred and the putative defendant therefore has not appeared through counsel, it is difficult to see how receipt by the attorney but not the party herself could satisfy the rule. Additionally, where a party named as a defendant is not a natural person, the absence of a summons upon the party's proper representative may compromise the notices of the summons by compromising the party's means of assuring that the papers served will be transmitted to the individuals in the organization authorized to respond to lawsuits.

> act of 1875, the defendant was to file his petition "before or at the term at which said cause could be first tried and before the trial thereof." [H. Black, *Dillion on Removal of Causes* (1898 § 151).]

Similar provisions were contained in the Judicial Act of 1911, ch. 231, 36 Stat. 1087, 1095, 1097.

Thus, former 28 U.S.C. § 72, for example, provided that a petition for removal was required to be filed "at any time before the defendant is required by the laws of the State or rule of the State court in which such suit is brought to answer or plead." Former § 74 and § 75 in turn provided for the filing of a removal petition at any time "before trial or final hearing" in civil rights cases and cases involving revenue officers, court officers and officers of either House. 28 U.S.C. §§ 72, 74, 76 (1940 ed.); *see also* H.R. Rep. No. 2646, 79th Cong., 2d Sess., A130 (1946), *reprinted in* 1A B. Reams, & C. Haworth, Congress and the Courts: A Legislative History 1787-1977 815 (1978) (hereinafter Congress and the Courts).

As enacted in 1948 as part of a revision of the entire judicial code, 28 U.S.C. § 1446(b) stated that "[t]he petition for removal of a civil action or proceeding may be filed within twenty days after the commencement of the action or service of process, whichever is later." 62 Stat. 939 (1948). Thus, section 1446(b), as originally enacted, explicitly maintained the historical role for service of process.

Prior to 1949, then, an individual named in a state lawsuit complaint as a defendant could wait to remove, as he could wait to respond to the complaint in any other manner, until (1) the plaintiff took the necessary steps to indicate that the plaintiff intended to pursue the suit to judgment against that particular individual; and (2) the individual had received notice of the suit sufficient to meet the due process requirements of the Fourteenth Amendment.

C. The Eleventh Circuit's decision necessarily assumes that this procedural scheme, with its deep historical roots, was discarded entirely through a 1949 corrective amendment to the 1948 comprehensive code revision. For, as we have stressed, under that court's decision, the time to remove can run *before* a plaintiff has taken any steps to pursue his state court lawsuit against a putative defendant beyond naming him in, and providing him with, a complaint, and *before* the putative defendant has received the formal notice reasonably calculated to apprise him of the pendency of the lawsuit and to afford him an opportunity to present his objections.

Against this background, the question in this case is whether Congress *sub silentio,* by a technical 1949 amendment, eliminated its heretofor consistent insistence that the decision to remove was subject to the same procedural prerequisites, for the same reasons, as any other action required of a putative defendant in a lawsuit.

And an affirmative answer to the question, as given by the Eleventh Circuit, necessarily entails the conclusion that in the removal context alone, of all legal contexts of which we are aware, Congress intended to require that an individual take action or lose procedural rights *before* being properly made a party defendant in a lawsuit and before being notified through service of summons that the plaintiff intends to pursue judgment against the putative defendant in court.

Any such conclusion, we believe, could be reached only if Congress' intent to so legislate were unmistakable. For where, as here, "we are dealing with . . . a background of several hundred years of history . . . departure from that long tradition . . . should [not] be lightly implied," unless "the history or the language of the [statute] compels[s] it." *Hecht v. Bowles*, 321 U.S. 321, 329-30 (1944). *See also Tenney v. Branhove*, 341 U.S. 367, 376 (1951) ("We cannot believe that Congress . . . would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before

us"). *See also Briscoe v. LaHue*, 460 U.S. 325, 334 (1983); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). As we show in Part II, there is no such compulsion here.

II. THE REMOVAL STATUTE AT ISSUE.

The rule articulated by the Court of Appeals represents a major departure from a long tradition well grounded in history and reason. Neither the language of the statute nor the legislative history can support such a reading. Instead, the 1949 amendment had a considerably more modest purpose, as a reading of that provision against the historical background, in the context of related statutes and rules, and in light of extremely clear legislative history, demonstrates.

A. In concluding that the removal statute had a plain meaning, the Eleventh Circuit's analysis "[b]y and large . . . begins and ends with . . . three words": "*receipt* . . . through service *or otherwise.*" *Michetti Pipe Stringing v. Murphy Bros.*, 125 F.3d 1396, 1397-98 (11th Cir. 1997) (emphasis in original). But, while the "starting point is the language of the statute," *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985), in expounding a statute, the court " 'must not be guided by a single sentence or member of a sentence, but look[s] to the provisions of the whole law, and to its object and policy.' " *United States National Bank of Oregon v. Independent Ins. Agents of America*, 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849)); *see also Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990) (same).

Thus, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). And, when placed in context, the language of § 1446(b) is most fairly read as providing that the removal period begins

only after the defendant has been served with a summons *and* provided with a copy of the complaint.

1. Even viewed in isolation, the clause on which the Eleventh Circuit focused to the exclusion of everything else can be sensibly read as stating that the removal time runs from the receipt of the complaint whether the complaint is delivered along with the "service" of summons or separately—*viz.*, as resting on the premise that the bedrock requirement that there be such formal service of jurisdiction-invoking process has been fulfilled. "[R]eceipt . . . by service or otherwise," that is, can be understood to mean either "receipt along with the service of summons" —as was contemplated by state rules that were analogous to Federal Rule of Civil Procedure 4 ("(c) A summons shall be served together with a copy of the complaint")— or "receipt apart from and after the service of summons," as was the practice in some jurisdictions. Under either alternative, service of summons is still contemplated.

It is very much to the point in this regard that the rest of the sentence from which the quoted language is drawn supports the interpretation that service of a summons is required. The next clause sets forth an alternative time period, *viz.*, from the time of service of the summons, where the initial pleading has been filed in court and is not required ever to be served on the defendant. 28 U.S.C. § 1446(b). Given this provision, § 1446(b) is most rationally read as mandating that in all situations, —regardless of whether the complaint is filed or served or simply provided—the bedrock requirement of service of the summons also must be fulfilled.

2. The meaning of § 1446(b) is further illuminated by considering, in the context of the statute as a whole, the use of the word "defendant" in § 1446(b) to designate the person who may remove an action.

The question of who is a "defendant" for removal purposes frequently arises in the case of multiple defendants.

As a general rule, all defendants who may properly join in the notice of removal must join. *Gableman v. Peoria, D. & E. R.R.*, 179 U.S. 335 (1900); *Chicago, R.I. & P. R.R. v. Martin*, 178 U.S. 245 (1900). But a non-resident defendant who has not been served may be ignored, and need not be joined for purposes of removal. *Pullman v. Jenkins*, 305 U.S. 534 (1939). Thus, the *unserved*, non-resident party is treated as if he is not a "defendant" at all.

The *Pullman v. Jenkins* rule is reflected in the language of § 1441(b), delineating the requirements for removal based on diversity of citizenship. Section 1441(b) provides that a diversity action "shall be removable only if none of the parties in interest properly joined *and served* as defendants is a citizen of the State in which such action is brought." (Emphasis added). This choice of words clearly differentiates "parties in interest" and individuals who have been brought into an action through formal service, and terms the latter, but not the former, "defendants."

Reading "defendant" as used in § 1446(b) consistently with "defendant" as used in § 1441(b) strongly supports the conclusion that § 1446(b) is addressed only to named individuals who have been served with summons, and not to individuals named in a complaint as defendants but never brought into the proceeding through service of summons.[7]

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[7] The § 1441 description of a removal action as one "*brought* in a State court" (emphasis added) also illustrates that § 1446(b) cannot be read as the Court of Appeals read it. No single standard exists under state law, or existed when § 1446 was drafted, regarding when an action is brought or commenced.

A survey conducted when Rule 3 was being formulated in 1938, reported the number of states which had adopted various methods for determining the commencement of actions (some states had alternative methods) as follows:

3. Finally, any conclusion as to the meaning intended by the drafters of 28 U.S.C. § 1446(b) must take into account the use of all but identical language in Federal Rule of Civil Procedure 81(c).[8] *Cf. C.J.R. v. Lundy*, 516 U.S. 235, 250 (1996).

Rule 81(c) states that

> [i]n a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules *within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based*, or within 20 days after service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. [Emphasis added].

Construing "receipt . . . through service or otherwise" in Rule 81(c), consistently with the Eleventh Circuit's construction of the same language in § 1446(b)—*viz.*, to mean that no service of process is required before the

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(1)	filing a complaint	14 states;
(2)	praecipe	3 states;
(3)	service of summons	21 states;
(4)	filing a complaint or service of summons	4 states;
(5)	filing a complaint and causing a summons to issue thereon	8 states;
(6)	[in certain actions] notice and motion of judgment	2 states.

1 J. Moore, Federal Practice ¶ 3 App. 100, n.2 (3d ed. 1998).

In no jurisdiction—then or now—is an action commenced by simply providing a putative defendant with a copy of the complaint.

[8] As we show later (at pp. 20-24, *infra*), § 1446(a) and Rule 81(c) were drafted contemporaneously and meant to be read consistently.

defendant is required to answer—creates a major jurisdictional problem. Since, by the Eleventh Circuit's hypothesis, the state court had no jurisdiction over the person, the federal court will also have no jurisdiction over the person.[9] And, requiring the "defendant" nonetheless to respond to the complaint, even though he was never formally served and brought into the case and put within any court's jurisdiction, would compel him to act or else subject himself to judgment, in violation of the most fundamental principles of civil procedure. *See* pp. 5-10, *supra*.

Indeed, such a construction of Rule 81(c) would directly conflict with Federal Rule of Civil Procedure 12, which provides that "a defendant shall serve an answer within 20 days after being served with the summons and complaint . . . ."[10]

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[9] The federal court does not obtain jurisdiction over an unserved defendant simply because he appears to remove the case. *Arizona v. Manypenny*, 451 U.S. 232, 242 n.17 (1981) (citing *Freeman v. Bee Machine Co.*, 313 U.S. 448, 449 (1943); *Minnesota v. United States*, 305 U.S. 382, 389 (1939); *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U.S. 377, 382 (1922)); *see also Morris & Co. v. Skandinavia Ins. Co.*, 279 U.S. 406, 409 (1929) (objection to the court's jurisdiction over the person of respondent not waived by removal); *General Inv. Co. v. Lake Shore & M. S. Ry. Co.*, 260 U.S. 261, 288 (1922) ("[a] want of jurisdiction in the state court is not cured by the removal").

[10] Nor can an individual named in the complaint as a defendant rely on the second clause of Rule 81(c) to wait after removal for service of the summons before responding. The Supreme Court Explanatory Note regarding the 1948 amendment of subdivision (c) makes clear that that portion of the Rule applies to those states where the defendant may never receive a copy of the initial pleading. *See* pp. 20-21, *infra*. Courts that have considered the contention that a defendant, who has not yet been served with summons, can rely on the second clause of Rule 81(c) in order to avoid filing a responsive pleading, have rejected it. *See, e.g. Silva v. City of Madison*, 69 F.3d 1368, 1375 (7th Cir. 1996) ("[A]lthough the plain language of Rule 81(c) can be read to apply all three time periods set forth in the rule to all removal cases, this in-

B. The legislative history of 28 U.S.C. § 1446(b) as amended in 1949 and the related Federal Rule of Civil Procedure 81(c), reveal an intent to preserve the varied state court rules for commencement of an action and service of process, while at the same time seeking some uniformity as to the period for removal *after those conditions are met*. Moreover, there is in the history no indication whatever that Congress meant to sacrifice the time-honored rule that it is service of summons that triggers any and all obligations of a putative defendant to take action in a lawsuit or forego rights to the need for administrative consistency.

The Eleventh Circuit was thus entirely wrong in treating the legislative history of § 1446(b) as consistent with its reading of the section's language on the ground that the history purportedly indicates that Congress wanted "to make practice identical from state to state." 125 F.3d at 1399. The Eleventh Circuit's supposition that the goal was total uniformity is a gross oversimplification of the goals of the 1948 legislation and a complete misstatement of the purposes of the 1949 legislation.

1. (a) Prior to the 1948 amendment to the Judicial Code, the federal removal statutes, although they had varied in other respects, had uniformly permitted a putative defendant to await service of process before removing the action. *See* pp. 10-11, *supra*. At the same time—that is, before 1948—Federal Rule of Civil Procedure 81(c) provided in relevant part that:

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terpretation is not compatible with the intent of the drafters of either § 1446 or Rule 81. It is clear that the second time period was not intended to apply in a state in which, when service is effected, the complaint is served along with the summons. . . . Thus, because only the first and third time periods in Rule 81(c) apply to the City, the City was required to file a responsive pleading within the later of twenty days after receipt of the complaint 'through service or otherwise' or five days after removal"); *Savarese v. Edrick Transfer & Storage, Inc.*, 513 F.2d 140, 143 (9th Cir. 1975) ("[W]e conclude that the second clause of rule 81(c) applies only to cases arising in states which do not require service of both a summons and complaint").

> In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within the time allowed for answer by the law of the state or within 5 days after the filing of the transcript of the record in the district court of the United States whichever is longer. [Fed. R. Civ. P. 81(c) (1937), *reprinted in* 14 J. Moore, Federal Practice, ¶ 81 App. 0-[1]] (3d ed. 1998).]

Thus, the pre-1948 Rule, like the contemporaneous statutory provisions, contemplated that there would be service of process before a putative defendant is compelled to present his defenses to an action.

Rule 81(c) was amended in 1946 by adding the phrase "but in any event within 20 days after the filing of the transcript." 14 J. Moore, *supra* § 81 App. 014[3]. The purpose of this amendment was to prevent certain delays by a defendant in interposing his answers or presenting his defenses. Committee Note of 1946, *reprinted in* 14 J. Moore, *supra*, § 81 pp. 03[2]. The Rule was, to be sure, a first step towards "uniformity" in the removal practice but notably, that "uniformity" only addressed the practice *after* service of process, not before.

(b) The 1948 revision of the Judicial Code resulted in the substitution of a single procedural provision in place of the various provisions previously in place. Thus, 28 U.S.C. § 1446(b), as originally enacted, provided that "[t]he petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service of process, whichever is later." 62 Stat. 939 (1948).

The House Report accompanying the proposed Judicial Code revision explains that "[a]s thus revised, the section will give adequate time and operate uniformly throughout the Federal jurisdiction." H.R. No. 308, 80th Cong., 1st Sess. (1947) at A135, *reprinted in* 1B Congress and the Courts, *supra*, at 1459. Like the 1946 amendment to

Rule 81(c), however, the "uniform" operation of the statute quite obviously went only to the time *after* service of process and the commencement of the action under state law; no attempt was made to eliminate the variation in state laws concerning the means and timing of service of process.[11] The statute therefore "operate[d] uniformly" only in the sense that uniform procedure for removal *after* service of process and commencement of the action was assured.

2. After the Judicial Code was amended in 1948, the Judicial Conference of the United States directed its Committee on Revision of the Judicial Code ("Judge's Committee"), headed by Circuit Judge Albert B. Maris, to continue to work on the revisions. S. Rep. 303, 81st Cong., 1st Sess., (1949) at 2, *reprinted in* 1949 U.S. Code Cong. & Admin. News 1248, 1248. That Committee addressed to all federal judges an inquiry requesting "that any ambiguities and errors which had been discovered in revised titles 18 and 28" be brought to its attention, *but cautioned that "no substantive changes could be considered in a correction bill." Id.* (emphasis added). Additionally, the Advisory Committee on the Federal Rules of Civil Procedure made suggestions to the Committee to harmonize the Civil Rules with Title 28. Based on both sets of suggestions, the Judge's Committee proposed an amendment to § 1446(b). *Id.*

(a) The Advisory Committee on the Federal Rules explained the sole concern that gave rise to the 1949 amendment to § 1446(b), and the concommitant amendment to Rule 81(c):

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11 The Eleventh Circuit cites this page of House Report No. 308 for the proposition that "the stated intent for the 1948 amendments was to make practice identical from state to state." 125 F.3d at 1399. But it was obviously beyond the authority of Congress to dictate to the states concerning their rules of civil procedure. And, then as now, the timing and method of commencement of actions and service of process varied from state to state. Thus, "identical" practice or timing could not have been Congress' goal.

> [S]ubsection (b) [of § 1446] gives trouble in states where an action may be both commenced and service of process made without serving or otherwise giving the defendant a copy of the complaint or other initial pleading. To cure this statutory defect, the Judge's Committee appointed pursuant to action of the Judicial Conference and headed by Judge Albert B. Maris is proposing an amendment to § 1446(b) to read substantially as follows: "The petition for removal of a civil action or proceeding shall be filed within 20 days after the receipt through service or otherwise by the defendant of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based." [Advisory Committee Note of 1948, *reprinted in* 14 J. Moore, Federal Practice ¶ 81 App. 04[2] (3d ed. 1998).]

Both Committees, then, were only seeking to cure a technical defect of the earlier provision as applied to some states, by assuring that in those states the defendant had sufficient information to make an informed decision about removal.

So as to harmonize the Rules with the proposed statutory amendment, the Advisory Committee proposed that Rule 81(c) also be amended to state that in a removed action, a defendant shall answer or present the other defenses available to him within "20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth claim for relief upon which the action or proceeding is based, or within 5 days after the filing of the petition for removal, whichever period is longer." Advisory Committee's Proposed 1948 Amendment, *reprinted in* 7 J. Moore, Federal Practice ¶ 81.01[17] (2d ed. 1995). The Advisory Committee explained that this revised language "is geared to th[e] proposed statutory amendment; and gives the defendant at least 5 days after removal within which to file his defenses." Advisory Committee Note of 1948, *reprinted in* 14 J. Moore, Federal Practice, ¶ 81 App. 04[2] (3d ed. 1998).

This Advisory Committee note and these initial proposed amendments to 28 U.S.C. § 1446(b) demonstrate the following points:

First, the post-1948 Judicial Code amendments to § 1446(b) and to Rule 81(c) were proposed as parallel changes to address the same problem, and the language of the section and the rule must be construed consistently. If "receipt [of the complaint] by service or otherwise" somehow abrogates the need for jurisdiction-invoking service of process, that abrogation must apply in both situations—removal and answer. *See* pp. 16-17, *supra.*

Second, nothing in the Advisory Committee Notes suggest that the drafters anticipated that the amendment could possibly have the effect of abrogating the fundamental rule that formal service of process is always necessary to bring a named party into a lawsuit as a party and to require him to respond or else suffer legal consequences. Rather, the purpose of the amendments was to address a narrow problem that arose in certain jurisdictions "*where an action* [*is*] *both commenced and service of process made.*" *Id.* (emphasis added).

(b) Before the amendments to Rule 81(c) were adopted, the Supreme Court made one additional change in the Rule. As the Court explained:

> The phrase, "or within 20 days after service of summons upon such initial pleading, then filed," was inserted following the phrase, "within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based," because in several states suit is commenced by service of summons upon the defendant, notifying him that the plaintiff's pleading has been filed with the clerk of court, thus he may never receive a copy of the initial pleading. The added phrase is intended to give the defendant 20 days after service of such summons in

> which to answer in a removal action, or 5 days after the filing of the petition for removal, whichever is longer. In these states, the 20 day period does not begin to run until the pleading is actually filed. [Supreme Court's explanatory Note regarding the 1948 amendment of subdivision (c), *reprinted in* 7 J. Moore, Federal Practice, ¶ 81.01[19] (2d ed. 1995).]

Rule 81(c), as amended, was adopted in December, 1948.

In May, 1949, Congress amended 28 U.S.C. § 1446(b) so as to conform to the Supreme Court's Advisory Committee note. As explained in the House Committee Report:

> Subsection (b) of section 1446 . . . has been found to create difficulty in those States, such as New York, where *suit is commenced by the service of a summons* and the plaintiff's initial pleading is not required to be served or filed until later.
>
> The first paragraph of the amendment to subsection (b) corrects this situation by providing that the petition for removal need not be filed until 20 days after the defendant has received a copy of the plaintiff's initial pleading.
>
> This provision, however, without more, would create further difficulty in those States . . . where *suit is commenced by* the filing of plaintiff's initial pleading and the issuance and *service of a summons* without any requirement that a copy of the pleading be *served upon or otherwise furnished to the defendant.* Accordingly the first paragraph of the amendment provides that in such cases the petition for removal shall be filed within 20 days after the service of the summons.
>
> Th[is] paragraph of the amendment conforms to the amendment of rule 81(c) of the Federal Rules of Civil Procedure . . . adopted by the Supreme Court on December 29, 1948 . . . .

H.R. Rep. 352, 81st Cong., 1st Sess. (1949), *reprinted in* 1949 U.S. Code Cong. & Admin. News 1254, 1268 (emphasis added).[12]

Again, the legislative history is significant in two critical respects:

First, Congress viewed the language "receipt by service or otherwise" to address the problem where a defendant who had been served with process had not received the complaint; the solution was that he "need not file" until after he does receive the complaint. As numerous courts that have examined this legislative history have concluded, "[t]his change was intended to *expand* the removal period . . .," not to contract it. *Thomason v. Republic Ins. Co.*, 630 F. Supp. 331, 333 (E.D. Cal. 1986) (emphasis added); *Marion Corp. v. Lloyds Bank, PLC*, 738 F. Supp. 1377, 1379 (S.D. Ala. 1990); *Love v. State Farm Mut. Auto. Ins. Co.*, 542 F. Supp. 65, 68 (N.D. Ga. 1982).

Second, nothing in the House or Senate Report or the Supreme Court Advisory Committee notes suggests any intention whatever to eliminate the prior requirement that service of process was required. Moreover, the change in the language was directed particularly at two states—New York and Kentucky—where, according to the reports themselves, service of process was required to commence the action. Since an action is not removable until it has been commenced, this is further confirmation that Congress started from the premise that service of process would occur before removal under the new 28 U.S.C. § 1446(b) or under the old.

[12] *See, also* S. Rep. No. 303, 81st Cong., 1st Sess., *reprinted in* 1949 U.S. Code Cong. & Admin. News 1248, 1254 ("[i]n some States suits are begun *by the service of a summons or other process* without the necessity of filing any pleading until later. As the section now stands, this places the defendant in the position of having to take steps to remove a suit to Federal court before he knows what the suit is about. As said section is herein proposed to be rewritten, a defendant *is not required to file* his petition until 20 days after he has received (or it has been made available to him) a copy of the initial pleading filed by the plaintiff setting forth the claim upon which the suit is based and the relief prayed for.") (emphasis added). Since the intent was to address the same problem, the minor differences in language between the Rule and the statute presumably came about because the Supreme Court's draft was less than clear.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Eleventh Circuit remanding this case to state court should be reversed.

Respectfully submitted,

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